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OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

February 6, 2013

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

FREEDOM OF INFORMATION ACT REQUEST

Freedom of Information Officer
U.S. EPA, Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Hq.foia@epa.
FOIA REQUEST

Dear Sir or Madam:

This is a request under the Freedom of Information Act (5 U.S.C. § 552, as amended).

By this letter the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah and Wyoming ("Requesting States") are requesting any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2009, to the date of this letter that discuss or in any way relates to:

- (a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy ("Other Organizations"), concerning:
 - i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("CAA"), 42 U.S.C. § 7604(a)(2);

- ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("SIP") required to be submitted to the U.S. Environmental Protection Agency ("EPA") pursuant to CAA § 169A for any State;
- iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "Subject").

"Interested Organizations" is defined as any one of the following organizations:

- National Parks Conservation Association
- Montana Environmental Information Center
- Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club
- San Juan Citizens Alliance
- Our Children's Earth Foundation
- Plains Justice
- Powder River Basin Resource Council
- Sierra Club
- Environmental Defense Fund
- Wildearth Guardians
- Natural Resources Defense Council
- Western Resource Advocates
- Wyoming Outdoor Council
- Greater Yellowstone Coalition

(b) Copies of any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) sent or received by the following EPA offices:

- i. the Office of the Administrator;
- ii. the Office of Environmental Information;
- iii. the Office of General Counsel;
- iv. the Office of Inspector General;

- v. the Office of International and Tribal Affairs;
- vi. the Office of Research and Development;
- vii. Region 1;
- viii. Region 2;
- ix. Region 3;
- x. Region 4;
- xi. Region 5;
- xii. Region 6;
- xiii. Region 7;
- xiv. Region 8;
- xv. Region 9; or
- xvi. Region 10.

(including receipt by carbon copy or blind carbon copy), regarding the Subject including, but not limited to, documents sent by or received from individuals representing or employed by the Interested Organizations or Other Organizations.

Reason for FOIA Request

Over the past three years, the EPA has allowed its regulatory agenda to be largely defined by litigation settlements it has entered into with environmental organizations. Specifically, on at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included paying plaintiffs' attorneys' fees) brought under the CAA. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations. Unfortunately, States responsible for implementing many of these regulations have little knowledge of or input in this process, which is not consistent with the cooperative federalism structure of federal environmental law.

Out of the forty-five settlements that have been made public, EPA has paid almost \$1 million in attorneys' fees to these groups, while also committing to develop a suite of sweeping new regulations. One EPA Consent Decree led to the promulgation of EPA's costliest regulation ever - the Mercury Air Toxics Standards (MATS). Other Consent Decrees include obligations that define how and when EPA acts on forty-five individual State Regional Haze SIPs - including the imposition of proposed federal implementation plans ("FIPs").

Many Consent Decrees authorize EPA to act in a way that is not consistent with current law. For example, Regional Haze Consent Decrees allowed EPA to propose combined Regional Haze SIPs/FIPs - something EPA has not done before in administering the CAA.

This is detrimental to the States and "unwinds" the State and federal partnership contained in the CAA.

States affected by these non-governmental organization lawsuits are not included as parties in the suits and when affected States try to intervene, EPA and the environmental groups frequently oppose State intervention. For instance, when the State of North Dakota sought to intervene in *Wildearth Guardians v. Jackson* in the U.S. District Court for the Northern District of California (where *Wildearth Guardians* filed its suit), EPA opposed the intervention despite the fact that the case involved how and when EPA should act on North Dakota's proposed Regional Haze SIP. *Wildearth Guardians v. Jackson*, No. C-09-2453-CW, 2011 U.S. Dist. LEXIS 14378 (N.D. Cal. Dec. 27, 2011) (order denying North Dakota's intervention).

State Attorneys General from the Requesting States are in the process of evaluating EPA's alarming practice of relying on Consent Decrees to deny the States their important role as a partner with EPA in implementing federal environmental law. Not only does EPA's action harm and jeopardize the States' role as a partner with EPA, but it harms the interests of the citizens of the Requesting States. Our citizens rely on and expect the States to implement federal environmental law. Often, these implementation efforts require the States to design plans to meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. When EPA coordinates with non-governmental organizations regarding how federal environmental law should be applied and implemented in an individual State and excludes the State from that effort the State and its citizens are harmed.

Rather than make individual FOIA requests, the Requesting States are making one request for the release of documents with the Interested Organizations and Other Organizations concerning the Subject. The Requesting States have lobbied, litigated, and publicly commented on federal actions which directly affect their individual State interests and those of their citizens. The requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States.

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

Fee Waiver Request

The Requesting States request that you waive any applicable fees since disclosure meets the standard for waiver of fees as it is in the public interest. *See* 40 C.F.R. § 2.107(l). Specifically, this request concerns “the operations or activities of the government;” disclosure is “likely to contribute” to an understanding of government operations or activities; disclosure will contribute to “public understanding;” the disclosure is likely to contribute “significantly” to public understanding of government operations and activities; and the States have no commercial interest in disclosure of the documents – the Requesting States’ interest is to facilitate and promote the public interest. 40 C.F.R. § 2.107(2)(i),(iv).

Reasons for Granting the Fee Waiver Request

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA’s operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

The Requesting States plan to make these documents available to the public at the University, Federal Depository and State Library systems (“**Library Systems**”) in the respective Requesting States. As these facilities are open to the general public, many people will thereby have access to the information contained in the materials which are the subject of this request. Most, if not all, of these Libraries also serve as a Federal Depository. Federal Depository Libraries were “established by Congress to ensure that the American public has access to its Government’s information.” <http://www.gpo.gov/libraries/>. As Federal Depositories, these libraries ensure that the agency publications and other information “are highly visible to the public, promoted, and safeguarded.” *Id.* Moreover, making available the requested Subject information and report at University Libraries will facilitate the teaching and research occurring at these Universities on important public policy issues including cooperative federalism and the State federal partnership. None of the requested Subject information or the resulting report will be used for commercial use or gain.

A. Legal Standard for Fee Waivers

FOIA’s fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver test “should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Id. 2004). FOIA imposes a non-discretionary duty to provide documents without any charge if the disclosed information

satisfies a two-prong test established by statute. *Fed. CURE v. Lappin*, 602 F.Supp. 2d 197, 202 (D.D.C. 2009) (documents “shall be furnished without any charge” if two-prong test is satisfied (emphasis and omission in original)). First, the disclosed information must be likely to significantly contribute to public understanding of governmental operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). Second, the disclosed information cannot be primarily in the commercial interests of the requester. *Id.*

EPA has promulgated regulations detailing the specific factors it considers when evaluating the two-prong statutory test for fee waiver requests. 40 C.F.R. § 2.107(l)(2)-(3). EPA’s regulations elucidate further that to be granted fee waiver requests a requester must establish that the information requested for disclosure must pertain to and significantly contribute to the public understanding of governmental operations and activities. As this FOIA Request demonstrates, the Requesting States have clearly met all of the statutory and regulatory requirements necessary to be granted a fee waiver.

1. First Factor: The FOIA Request is for Records Concerning EPA’s Operations and Activities.

The Subject information the Requesting States seek directly concerns the operations and activities of EPA. 40 C.F.R. § 2.107(l)(2)(i). Specifically, the FOIA Request seeks information directly related to EPA’s operations and activities related to its implementation and enforcement of the CAA through negotiated settlements with non-governmental organizations. These settlements directly imposed standards upon and/or required the State to take certain actions under the federal environmental program at issue in the lawsuit or administrative action.

In its enforcement of these federal programs through settlements with non-governmental organizations, EPA is using public funds and resources. The Tenth Circuit held that a federal agency’s expenditure of public funds and resources was an operation and activity of that agency satisfying the first factor of the public interest prong. *Forest Guardians*, 416 F.3d at 1178; *see also Edmonds Inst. v. DOI*, 460 F. Supp. 2d 63, 66-67 (D.D.C. 2006). Similarly, EPA has devoted public funds to paying attorneys’ fees and devoted public resources to negotiating and enforcing the settlements. Clearly, the Requesting States meet the first factor as the requested Subject information concerns the “operations or activities of the government.” 40 C.F.R. § 2.107(l)(2)(i).

2. Second Factor: The FOIA Request Seeks Meaningful Information That Contributes to an Increased Public Understanding about EPA’s Operations or Activities Regarding the CAA and SIPs.

In considering whether to grant the Requesting States fee waiver request, EPA must determine whether the requested Subject information is meaningfully informative and likely to contribute to an increase in public understanding about those operations or activities. 40 C.F.R. § 2.107(l)(2)(ii). The Requesting States FOIA Request seeks information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest. How a federal agency interacts with non-governmental interests in the formation of policy has been identified as an "issue of the utmost importance." *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). And "an understanding of how [a federal agency] makes policy decisions, including the **influence of any outside groups on this process**, is also important to the public's understanding of the [government]." *Forest Guardians*, 416 F.3d at 1179-80. (emphasis added).

With the release of this meaningful information the Requesting States will use it to educate the public about how EPA has elected to resolve litigation and administrative actions which directly affect the formation of current and future federal environmental policy. In *Western Watersheds v. DOI*, the U.S. District Court determined the requesting party satisfied the second factor by requesting information that it would use to educate the public about an agency's decision-making and its intent to create a summary of such information that was reader-friendly. 318 F. Supp. 2d at 1040-41. The U.S. District Court for the District of Columbia reached the same result in *Federal CURE* in holding the requesting party's intent to analyze and synthesize the requested information into a report relayed to the public via email and internet satisfied the second factor of the public interest prong. 602 F. Supp. 2d at 202-03. As explained in this FOIA Request, the Requesting States will prepare a report summarizing the Subject information which will be made available to the general public through the States' websites and the Library Systems of the Requesting States.

**3. Third Factor: The FOIA Request Seeks Information That
Contributes to the Understanding of a Broad Audience of
Persons Interested in EPA's Operations or Activities
Regarding the CAA and SIPs.**

To satisfy the third factor, the requesting party must show that the requested information contributes to the understanding of a broad audience of persons interested in the subject. 40 C.F.R. § 2.107(l)(2)(iii). In *Forest Guardians*, the Court held that the requesting party satisfied the third factor by demonstrating its intent to broadly disseminate the compiled information, which was only available in piecemeal and hard-to-access form. *Forest Guardians*, 416 F.3d at 1181-82. As in *Forest Guardians*, the Requesting States seek piecemeal information that is held in a number of EPA's regional or other offices throughout the nation and which information cannot be easily accessed. The requested information relates to EPA's communications and documentation in a large number of discrete lawsuits and enforcement actions. *Id.* (holding information in court houses,

newspaper articles, and affidavits not sufficient to justify denying a fee waiver). The Requesting States will then compile and summarize this information into an easily accessible and readable report for their citizens and distribute copies of the report to Congress and the media.

As detailed above, the Requesting States intend to disseminate the requested information by making the report as well as the underlying information publicly available on the Requesting States' websites as well as through the Library Systems of each of the Requesting States. Because the report will be posted on State government websites any American with access to the internet will have access to the report. Accordingly, the report will be available to better inform all U.S. citizens on matters affecting EPA's operations and policy formation. See *Judicial Watch Inc. v. U.S. DOI*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (requesting party's concrete plan or specific intent for publication and other dissemination of requested information demonstrates compliance with third factor). Further, the Requesting States stature as representatives of their respective citizens and accountability to their citizens to provide information affecting each State's implementation of the CAA demonstrates that the Requesting States can and will disseminate the requested information to a broad group of interested persons. See *Fed. CURE*, 602 F. Supp. 2d at 204 (stature of largest public advocacy group demonstrated ability to disseminate information to reasonably broad group).

Finally, the Requesting States will use the report to educate State and federal lawmakers regarding the activities of EPA in negotiating settlements with non-governmental organizations that directly affect current and future federal environmental policy. The report will provide invaluable information to these lawmakers as they consider future changes to environmental programs that will affect all Americans.

4. Fourth Factor: The FOIA Request Seeks Information That will Significantly Enhance the Public's Understanding of EPA's Operations or Activities Regarding the CAA and SIPs.

The intention of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *NRDC* at 496 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The Requesting States are seeking the Subject information so as to significantly enhance the public's understanding of EPA's operations and activities and to ensure that the public has the information necessary to determine whether EPA's actions in entering into settlements with non-governmental organizations are prudent or thwart the cooperative federalism approach embodied in many of the federal environmental programs. 40 C.F.R. § 2.107(f)(2)(iv). Further, the public currently has no access to the requested Subject information. Only with disclosure of the requested Subject information will the public's understanding of EPA's operations and activities be greater than "as compared to

the level of public understanding existing prior to the disclosure.” 40 C.F.R. § 2.107(l)(2)(iv).

As detailed above, the Requesting States intend to prepare a report on EPA’s decision-making process in negotiating and entering into certain litigation settlements and how these settlements are affecting current and future environmental policy. In taking the Subject information, which is not in the public domain, compiling it, and disseminating it to the public in easily accessible forums, the Requesting States meet the fourth factor. *Fed. CURE*, 602 F. Supp. 2d at 204-05. Clearly, the “public’s understanding of EPA decision making will be significantly enhanced by learning about the nature and scope of EPA communication[s]” and as such the Requesting States fee waiver request must be granted. *NRDC* at 501.

B. The Requesting States’ FOIA Request Satisfies the Commercial-Interest Prong of the Fee Waiver Test.

In considering whether the second prong of the public interest fee waiver test is met, EPA considers the existence and magnitude of the requesting party’s commercial interest in the requested information and whether the commercial interest outweighs the public interest. 40 C.F.R. § 2.107(l)(3). The Requesting States are exclusively comprised of State governments, which are noncommercial entities that have no commercial interest in the disclosure of information regarding the manner in which EPA operates. *See Fed. CURE*, 602 F. Supp. 2d at 201 (recognizing non-profit organization is a non-commercial entity entitled to fee waiver). The Requesting States’ intended use of the requested Subject information is to make the information available—free of charge—to their respective citizens in a readable, summarized fashion. The States have no intention of using the information disclosed for financial gain. Nor does making the information available to the public create a commercial interest for the Requesting States. Further, the public interest in disclosure necessarily is greater in magnitude than that of the Requesting States’ complete lack of commercial interest in the requested information. 40 C.F.R. § 2.107(l)(3)(ii). The Requesting States have no commercial interest in the information requested and therefore satisfy the second prong of the fee waiver test.

In light of the ongoing and contentious public policy controversy regarding EPA’s coordination and planning its regulatory agenda with non-governmental organizations, the Requesting States note that time is of the essence in this matter. There is a great need for prompt disclosure so that the released information may more adequately inform public understanding and discussion of EPA’s actions.

In the event that access to any of the requested records is denied, please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We therefore request that the Requesting States be provided with all

non-exempt portions which are reasonably segregable. We further request that you describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination, and in formulating arguments in case an appeal is taken. The EPA's written justification might also help to avoid unnecessary litigation. We of course reserve the right to appeal the withholding or deletion of any information and expect that you will list the office and address where such an appeal can be sent.

If for some reason, the fee waiver request is denied, while reserving my right to appeal such a decision, the Requesting States are willing to pay \$5.00 (five dollars) to cover costs of document search and duplication.

Access to the requested records should be granted within twenty (20) working days from the date of your receipt. Failure to respond in a timely manner shall be viewed as a denial of this request and the requesters may immediately file an administrative appeal.

Finally, the Requesting States ask that all correspondence regarding this FOIA request and all documents produced in response to this request be directed to the Attorney General of the State of Oklahoma.

Thanking you in advance for your prompt reply.

Sincerely,

E. Scott Pruitt
OKLAHOMA ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'P. Eubanks', with a large, sweeping flourish extending to the right.

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